No. [illegible]

[illegible] OPERATING CO., INC. and [illegible]
MUTUAL INSURANCE COMPANY,
Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK and
ALBERT AVERY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE RESPONDENTS JOHNSON AND KLOSEK IN OPPOSITION

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November 14, 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 528

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OPINIONS BELOW

The Opinion of the Court of Appeals (pages 40a-64a of the Appendix of the Petition) is reported at 398 F. 2d 900. The Opinion of the District Court (pages 8a-31a of the Appendix of the Petition) is reported at 243 F. Supp. 184. The orders of Deputy Commissioner Traynor are set forth on pages 3a-8a of the Appendix of the Petition.

QUESTION PRESENTED

Under contemporary admiralty concepts, does the Longshoremen's and Harbor Workers' Compensation Act cover injury or death sustained on a pier over navigable waters when the precipitating instrumentality is a shipboard crane?

STATUTES INVOLVED

In addition to the portions of the Acts cited in the Petitions heretofore filed, Respondent respectfully calls the attention of the Court to the following section of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, et seq.:

> 920 (Section 20 of the Act). Presumptions.
>
> "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter."

STATEMENT

Together with other members of their gang, William H. Johnson and Joseph J. Klosek, longshoremen, reported to the Bethlehem Steel High Pier, Sparrows Point, Maryland, to load a cargo of steel beams aboard a sea-going freighter tied up alongside. The High Pier extends into the Patapsco River, part of the navigable waters of the United States, in a southerly direction for a distance of approximately six hundred (600) feet.

The 16-member gang turned to at 8:00 A.M. November 14, 1963; the two men were part of the four longshoremen who were working "outside" — that is, on the pier. The

beams which measured roughly forty feet in length were delivered to the ship's side in gondola railroad cars. The ship's crane was being used to pick up the drafts and load them into the holds. The casualty occurred around 4:15 P.M. Klosek and Johnson passed the chain under a draft (the beams were banded into three drafts in the gondola car in question) hooked on and started toward the side of the car to climb out.

After starting up, the draft rotated, striking Klosek and propelling him out of the gondola car onto the dock; the same draft pinned his partner, Johnson, against the side of the railroad car. Johnson recovered from his injuries with residuals; Klosek died within a few hours from his injuries. The Deputy Commissioner denied the claims on the ground the injuries were not sustained "upon navigable waters"; the District Court affirmed.

The Court of Appeals in a 5-2 en banc decision held that the injury and death were compensable under the Longshoremen's and Harbor Workers' Compensation Act and remanded the cases. Chief Judge Sobeloff, speaking for the five man majority, cited four reasons for the decision, any one of which was deemed sufficient to establish coverage under the Act. The grounds for the decision were:

1. Congress possessed the constitutional authority to cover all longshoremen injured during the loading, unloading, repairing or refitting of vessels, and exercised the full scope of its authority by designing the Act to reach all injuries sustained by longshoremen in the course of their employment; it did not intend to "freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927 . . ." (398 F. 2d at 904).

2. If, for the purpose of argument, one assumes Congress had exercised the more limited tort jurisdiction, the phrase "upon navigable waters" must be "construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction" (398 F. 2d at 906).

3. Small vessels are able to navigate beneath the piers. "These waters are therefore navigable in fact" (398 F. 2d at 908).

4. This Honorable Court has twice mandated the humanitarian Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results . . ." and has admonished "(those) subject to the same danger . . . (are) entitled to like treatment under law." The Court of Appeals also adverted to the observations of Judge Soper that "the references therein to 'maritime employment' and the injury 'upon the navigable waters of the United States . . .' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements" (398 F. 2d at 906-909).

With the above elaboration, Respondents accept the "Statement" contained in the Government's Petition.

REASONS FOR DENYING THE WRIT

Respondents oppose the granting of the writ, particularly in the Klosek case, because this decision is consonant with decisions in other circuits which have held that when a longshoreman is lifted off the level of the pier and dropped, his injuries or death are compensable under the Act. The first decision to this effect was handed down in 1931 in *L'Hote v. Crowell*, 54 F. 2d 212 (5 Cir.). In *The Admiral Peoples*, 295 U.S. 648, 79 L. Ed. 1633, this Court explained that it had reversed on the question of dependency but

left undisturbed the jurisdictional determination (of *L'Hote*) that the injury was covered by the Act (295 U.S., at 653).

If, for policy considerations or because of the general importance of the matter to the uniform administration of the Act, the Court feels disposed to grant the writ, it is respectfully submitted the writ should be granted and the decision of the Court of Appeals affirmed per curiam without assigning the case for plenary consideration and argument, for the following reasons:

1. The decision below is plainly correct, supported by both logic and the philosophy of current admiralty concepts as enunciated by this Court. It is significant that the government did not attack the fairness, the legal correctness or the social desirability of the holding in its petition. After calling attention to the existing conflict in the circuits and the disparity of benefits that would result therefrom, the Solicitor General requested this Court to resolve the question because of its "general importance".

It is also illuminating to observe that — exclusive of *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 — of the other six Supreme Court decisions cited in the Amici Curiae Brief of National Association of Stevedores, et al., the most recent was decided in 1952; the dates of the others are 1917, 1920, 1922, 1924, and 1946. The Petition of Nacirema Operating Co., Inc., et al. contains no citation to a Supreme Court case other than *Calbeck*.

As former Chief Judge Sobeloff pointed out, "Regardless of the route traveled, we arrive at the conclusion that the injuries of all four longshoremen are embraced by the Act" (398 F. 2d at 908). The bases of the lower court's decision were itemized in the "Statement" portion of this Brief, *supra*.

2. The lower court correctly interpreted the legislative history of the Longshoremen's Act. This aspect of the case was thoroughly researched and argued below. The Petitioners filed a Supplemental Brief seven pages of which dealt exclusively with the legislative history of the Act. These Respondents filed a Supplemental Brief thirteen pages of which were devoted to the Act's legislative history.

After calling attention to the fact the Act by its own terminology was designated as one to provide compensation for disability or death incurred in certain "maritime employments", the opinion below traced the discussions in the hearings and pointed out that all the interested principals — the unions, the shipping industry and the Labor Department — testified in support of an act that would cover all injuries of maritime workers (398 F. 2d at 903).

In the final debate on the Act, shortly before it was enacted into law by a vote of 265 to 7, Congressman LaGuardia offered this explanation of the Act and its purpose:

> "This law simply gives the longshoremen the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414. (398 F. 2d at 905).

The lower Court then observed that theorizing was no longer necessary since this Court authoritatively resolved the question in *Calbeck*. It went on to quote excerpts from that opinion, the most pregnant of which were:

> ". . . Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. * * * . . . Congress intended the compensation act to have a coverage co-extensive with the limits of its authority". 370 U.S. at 130. (398 F. 2d at 905).

3. The court below was correct in concluding that the Admiralty Extension Act expanded the coverage of the Longshoremen's Act.

As authority for its conclusion in this regard, the lower court relied on *Calbeck* and also cited the *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496 (S.D., N.Y., 1964); *Boston Metals Co., et al. v. O'Hearne*, D.C., Md., Admiralty No. 4412 (unreported at District level, June 20, 1963); *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6 Cir., 1965); *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir., 1965) (by implication); *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260 (W.D. Wash., 1966) cases.

The above comments have been made in response to the points set forth in paragraph 4 of Petitioner Nacirema's "Reasons for Granting the Writ". We offer the following affirmative reasons for affirming the decision of the Court of Appeals:

A. The Act is remedial legislation and should be applied with the utmost liberality to avoid harsh and incongruous results.

One of the early cases in which this Court expressed its solicitude for the safety and welfare of employees engaged in the hazardous occupation of longshoring was *International Stevedoring Co. v. Haverty*, 272 U.S. 50, decided October 18, 1926, before the enactment of the Longshoremen's statute. From *Voris v. Eikel*, 346 U.S. 328, 98 L. Ed. 5 (The Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.) and *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, 98 L. Ed. 77 (A death on a marine railway 400 feet inland from the water's edge was held compensable under the Act.) (both decided in 1953).

Through *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 15 L. Ed. 2d 21 (Defense Bases Act, 1965); (On June 11, 1962 this Court denied certiorari. On October 18, 1965 it granted the petition for rehearing, vacated the earlier denial of certiorari and reinstated the award of compensation.) To *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 18 L. Ed. 2d 488 (1967) (The widow of a longshoreman was permitted to bring a suit against the shipowner who was the direct employer of the decedent.) and *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 20 L. Ed. 2d 30 (April 1, 1968), (Section 22 of the Act was liberally interpreted to permit a widow of a longshoreman to file and recover on a second claim after her first claim was rejected.) there has been a steady procession of cases in which the Act has been applied with considerable liberality.

This humanitarian concern for the plight of the longshoreman is equally evident in third party actions. Among some of the recent landmark decisions in this field may be mentioned: *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959); (The negligent setting of a control device on a seaworthy winch rendered the vessel unseaworthy and supported a judgment in favor of the longshoreman.) *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 3 L. Ed. 2d 292 (1959); (An injury within the "twilight zone" entitles the longshoreman to select the more favorable compensation Act and other concomitant remedies.) *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297 (1963); (A longshoreman injured by slipping on beans from a broken bag in a pier shed several hundred feet from the ship's side may recover against the ship on ground of unseaworthiness.) *Reed v. Steamship Yaka*, 373 U.S. 410, 10 L. Ed. 2d 448 (1963); (A longshoreman may maintain an unseaworthiness suit against the vessel although he is

employed directly by the bareboat charterer.) *Mascuilli v. United States*, 387 U.S. 237, 18 L. Ed. 2d 743 (1967). (The widow of a longshoreman was held entitled to recover against the vessel for her husband's death caused solely by the negligent operation of the longshoring gang.)

If third party liability, with its open end recoveries, is to be applied most liberally in favor of longshoremen, a fortiorari the closed end Compensation Act, expressly passed for their protection, should be so applied.

When dealing with the claims of seamen, whether the injuries were sustained on an offshore platform, ashore in a taxicab or aboard ship, the court has evidenced the same paternal concern. As a sampling of the protective decisions, we cite: *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252, 2 L. Ed. 2d 737 (1958); (An injured pile driver employed in connection with the installation of a radar tower was held eligible to sue as a seaman under the Jones Act.) *Butler v. Whiteman*, 356 U.S. 271, 2 L. Ed. 2d 754 (1958) (Inferences drawn from skimpy evidence were sufficient to support a recovery of a widow of odd job wharf laborer on the ground he was a seaman.) *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 4 L. Ed. 2d 941 (1960) (The shipowner's liability for unseaworthiness is completely divorced from concepts of negligence.) *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 5 L. Ed. 2d 20 (1960) (Seaman injured when he dropped on his toes a worn and defective wrench he was using may recover on the ground of unseaworthiness.) *Vaughan v. Atkinson*, 369 U.S. 527, 8 L. Ed. 2d 88 (1962) (A seaman is entitled to counsel fees when a shipowner wilfully and persistently defaults in its obligation to pay maintenance and cure.) *Tipton v. Socony Mobil Oil Company, Inc.*, 375 U.S. 34, 11 L. Ed. 2d 4 (1963) (The fact an offshore drilling

employee received benefits under the Longshoremen's Act is not admissible in his suit as a seaman under the Jones Act.) *Hopson v. Texaco, Inc.*, 383 U.S. 262, 15 L. Ed. 2d 740 (1966) (A sick seaman being taken to a United States consul and injured ashore through the negligent operation of a taxicab procured by the ship's Master may recover under the Jones Act.) *Pure Oil Company v. Suarez*, 384 U.S. 202, 16 L. Ed. 2d 474 (1966) (The venue provisions of the Jones Act were applied most liberally to sustain a seaman's suit.) and *Waldron v. Moore McCormack Lines, Inc.*, 386 U.S. 724, 18 L. Ed. 2d 482 (1967) (If too few men are assigned to do a job a seaman may sue the vessel on the grounds of unseaworthiness.)

The longshoreman should not be subjected to "pendulum" jurisdiction and justice, swinging back and forth between state and federal jurisdiction, as he performs his duties and takes his relief breaks aboard ship and on the adjacent pier.

II. Our government — and its courts — have been notoriously jealous of their admiralty jurisdiction and their dominion over "navigable waters".

In the Amici Curiae Brief counsel for the majority of the stevedoring contractors throughout the country asserts that when a pier is completed the "water over which it is built is permanently removed from navigation . . ." (p. 5). The zealousness of the courts in guarding the country's rights in navigable waters and related matters is evident from their insistence of the recognition of "the public property of the nation" and the "dominant servitude" in favor of the government. Some illustrative decisions are: *Economy Light & Power Co. v. United States*, 256 U.S. 113, 45 L. Ed. 847 (1920); *United States v. Holt State Bank*, 270

U.S. 49 (1925); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243 (1941); *Federal Power Commission v. Union Electric Company*, 381 U.S. 90, 14 L. Ed. 2d 728 (1965); *United States v. Rands*, 389 U.S. 121, 19 L. Ed. 2d 329 (1967) and *Hughes v. Washington*, 389 U.S. 290, 19 L. Ed. 2d 530.

The court below correctly asserted that this Court has expressly held "when once found to be navigable, a waterway remains so." (*United States v. Appalachian, and Economy Light v. United States, supra.*) After quoting this excerpt from *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557, 19 L. Ed. 999 (1870): "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce . . .", the lower court went on to concur in the sound conclusion of Judge Waterman in *Rochester Gas and Electric Corp. v. F. P. C.*, 344 F. 2d 594 (2 Cir., 1965) that a body of water is "navigable water" if:

> "(1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." (356 F. 2d at 908)

See also, the definition of "navigable waters" contained in Title 16, Section 796 of the United States Code which includes in the term "interruption falls, shallows, or rapids" compelling land carriage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If granted, the reversal of the judgments adverse to Respondents should be affirmed per curiam, without plenary consideration by this Court

and the cases remanded to the District Court for the entry of judgments consistent with the opinion of the Court of Appeals.

Respectfully submitted,

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November 14, 1968.

No. 9

Brief for respondent Avery filed on Nov. 16, 1968.
(not printed)

No. 9